RECORD
AND
BRIEFS

No. 10-1093

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOSEPH SMITH and SONYA SMITH,

Petitioners,

v.

STATE OF GEORGIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Georgia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I.

Should this Court grant certiorari to consider whether unobjected-to, intentional conduct by a prosecutor in closing argument creates a due process violation that requires a trial judge to stop the proceeding *sua sponte*?

II.

Should this Court grant certiorari to consider whether defense counsel rendered effective assistance under the Sixth Amendment to the Constitution when counsel made a strategic decision not to object to the argument of the prosecutor rather than offend the jury by appearing to disrupt the prosecutor's argument and when the jury may have even been alienated by the prosecutor's argument?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
I. STATEMENT OF THE CASE	1
II. REASONS FOR NOT GRANTING THE WRIT	7
A. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO REVIEW A DUE PROCESS CLAIM RAISED FOR THE FIRST TIME IN THIS PETITION	7
B. THIS COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER THE DUE PROCESS CLAIM BECAUSE, IF IT WERE TO GRANT CERTIORARI AND FIND FOR PETITIONERS, IT WOULD OVERRULE LONG-STANDING PRECEDENT ON THE ISSUE	10
C. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO CONSIDER THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM BECAUSE IT IS FACT-INTENSIVE	12
CONCLUSION	18

TABLE OF AUTHORITIES

Page

CASES

Beck v. Washington, 369 U.S. 541 (1962).....10

Caldwell v. Mississippi, 472 U.S. 320 (1985) 11, 12

Cardinale v. Lousiana, 394 U.S. 437 (1969).....9

Darden v. Wainwright, 477 U.S. 168 (1986).....11

Donnelly v. DeChristoforo, 416 U.S. 637 (1974).....11

Hernandez v. New York, 500 U.S. 352 (1991).....17, 18

Kimmelman v. Morrison, 477 U.S. 365 (1986) 17

Smith v. State, 288 Ga. 348, 703 S.E.2d 629 (2010).....5, 14, 16

Strickland v. Washington, 466 U.S. 668 (1984).....12, 16, 17, 18

RESPONDENT'S BRIEF IN OPPOSITION

I. STATEMENT OF THE CASE

Petitioners Joseph and Sonya Smith (hereinafter "Petitioners") were jointly indicted by the Cobb County, Georgia, grand jury on June 15, 2006, for malice murder of their son, Josef Smith, three counts of felony murder (with cruelty to children, aggravated assault, and false imprisonment as the underlying felonies), five counts of first degree cruelty to children, three counts of aggravated assault, and two counts of false imprisonment. (R. 4-12).[1]

At a jury trial held on February 5-14, 2007, at which the Petitioners were jointly tried, they were found guilty of involuntary manslaughter (as a lesser included offense of malice murder), one count of felony murder (cruelty to children), four counts of cruelty to children, all three counts of aggravated assault, one count of false imprisonment, and reckless conduct (as a lesser included offense of the remaining false imprisonment count). (R. 206-23, 236-39). At sentencing, both Petitioners were sentenced to life imprisonment for felony murder; twenty consecutive years for cruelty to children (striking Josef with a glue stick); ten years for cruelty to children (confining Josef to a small room) and false imprisonment (confining Josef to a small room), with these sentences to

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[1] Citations to the clerk's record prepared for direct appeal are "R"; citations to the trial transcript are "T"; citations to the motion for new trial transcript are "MNT."

run concurrent with each other and consecutive to the felony murder and cruelty to children (striking with a glue stick) counts; and twelve months for reckless conduct, to run concurrent with the felony murder and cruelty to children (striking with a glue stick) counts. The involuntary manslaughter, cruelty to children (striking Josef in the head and confining him in a box), and aggravated assault (using unknown object to strike Josef in the head) counts were merged into the felony murder count for sentencing purposes; and the remaining aggravated assault charges (striking with a glue stick and unknown objects) and cruelty to children charge (striking with unknown objects) were merged into the cruelty to children charge upon which the Smiths were sentenced (striking with a glue stick) for sentencing purposes. (R. 205-08).

Petitioners filed a timely notice of appeal. (R. 1-2).

On direct appeal, Petitioner Sonya Smith enumerated eight errors:

> (1) the evidence was insufficient to support the convictions;
>
> (2) the trial court erred in allowing the prosecutor to dim the lights in the courtroom, bring out a cake with lit candles, and sing "Happy Birthday" to the deceased victim during her closing argument;
>
> (3) the trial court erred in denying Petitioner's motion for a mistrial after her son,

Mykel, testified that the Smiths prayed that they had not "los[t] another son" after they pulled an unresponsive Josef from the box in which he had been placed;

(4) the trial court erred by denying Petitioner's motion for a new trial because the jury's verdict finding her guilty of involuntary manslaughter as a lesser included offense of malice murder was "mutually exclusive" from the jury's verdict finding her guilty of felony murder;

(5) the trial court erred by failing to properly advise Petitioner regarding her right to testify when her counsel announced that she would not be testifying on her own behalf;

(6) the trial court erred by overruling Joseph Smith's counsel's objection to the prosecutor asking a State's witness to rate the injuries suffered by the deceased in comparison to other cases that the witness had seen;

(7) the trial court erred in refusing to admit into evidence at the motion for new trial hearing a Court TV video recording of the prosecutor's closing argument; and

(8) trial counsel was ineffective because:

> (a) counsel failed to have voir dire recorded, (b) counsel failed to object to the prosecutor asking a witness to compare the victim's injuries in this case to others that he had seen, (c) counsel failed to object to Joseph Smith's counsel asking a State's witness about the severity of the

> victim's injuries, (d) counsel failed to object to references at trial to a court ruling regarding the custody of the Smiths' remaining children, (e) counsel failed to make a record of his agreement with the prosecutor stating that evidence of the Smiths' other deceased child would not be admitted at trial, (f) counsel failed to effectively cross-examine several State's witnesses, (g) counsel failed to make a closing argument, (h) counsel failed to object to the prosecutor's "Happy Birthday" song during closing argument, (i) counsel failed to present good character evidence at trial, and (j) counsel failed in his overall performance at trial, as evidenced by the cumulative effects of errors (a)-(i) outlined above.

(Petition, App. 3, 4, 5, 6, 7, 8).

On direct appeal, Petitioner Joseph Smith enumerated four errors:

> (1) the evidence was insufficient to enable a rational trier of fact to find Petitioner guilty of all the crimes for which he was convicted;
>
> (2) trial counsel was ineffective because he was acting under a conflict of interest;
>
> (3) trial counsel was ineffective because counsel failed to object to the prosecutor singing "Happy Birthday" during closing argument; and

> (4) the trial court erred by failing to merge Petitioner's conviction for felony murder into his voluntary manslaughter conviction for sentencing purposes because the verdicts on those counts were mutually exclusive.

(Petition, App. 13, 14, 16).

The Georgia Supreme Court found these enumerations of error were waived and/or lacked merit and affirmed Petitioners' convictions and sentences on November 8, 2010. *Smith v. State*, 288 Ga. 348, 703 S.E.2d 629 (2010). Two Justices dissented to the majority's decision on two related enumerated errors– i.e., the appellate court's ability to decide the "Happy Birthday" issue under a plain error analysis, and the ineffective assistance of trial counsel claim regarding counsel's failure to object to the prosecutor singing "Happy Birthday" during closing argument. *Id.* at 357-63. Petitioners moved for reconsideration; however, their motion was denied on December 14, 2010. *Id.*

Petitioners filed this petition seeking review of a substantive due process claim that was not raised below. (Petition, pp. 9, 14). They only challenged the prosecutor's closing argument demonstration on appeal in the context of trial court error and an ineffective assistance claim.

Due to the nature of the issue presented, Respondent relies on the facts found by the Supreme Court of Georgia on direct appeal. Those facts are as follows:

> [v]iewed in the light most favorable to the jury's verdict, the record reveals that Joseph and Sonya Smith routinely disciplined their son, Josef, by beating him with glue sticks, belts, and heated coat hangers; locking him in confined spaces for extended periods of time; and tying his hands with rope. During the day on October 8, 2003, Joseph disciplined Josef several times, striking him repeatedly with a foot long glue stick. At one point, Josef began complaining of severe stomach pains and had urine that was brownish in color. Later, while Joseph was taking a shower, Sonya Smith beat Josef with a glue stick, drawing blood through Josef's clothing. Sonya and the Smiths' eldest son, Mykel Booth, then forced Josef into a wooden box, beating him about the head as they did so. Sonya and Mykel then tied the box shut with a cord. When Joseph later came out of the shower and removed Josef from the box, the child was barely breathing. Emergency services personnel were called to the Smiths' residence with an unresponsive child complaint, and Josef was taken to the hospital, where he later died. Numerous medical experts examined the extensive bruising throughout Josef's body and to Josef's head, and testified that the cause of Josef's death was either blunt force trauma or asphyxiation.

Smith, 288 Ga. at 349.

II. REASONS FOR NOT GRANTING THE WRIT

A. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO REVIEW A DUE PROCESS CLAIM RAISED FOR THE FIRST TIME IN THIS PETITION.

Petitioners first ask this Court to grant certiorari to address the question of whether a trial judge has a duty to *sua sponte* stop a prosecutor from engaging in conduct during closing argument intended to inflame the passion of the jury. (Petition, p. i). Petitioners assert that the trial court, in the absence of an objection from any party, should have intervened to stop the prosecutor from lighting candles on a birthday cake and singing "Happy Birthday" during closing argument. (Petition, pp. 9-10). Petitioners assert the prosecutor's closing argument offended the decorum and dignity of the court. *Id.* Petitioners also assert the trial court must intervene in such demonstrations and there should be consequences for the prosecutor. (Petition, p. 14). Respondent urges the Court to decline to grant certiorari on this issue, as no such substantive due process issue was raised below addressing whether the trial court should have *sua sponte* intervened during such a demonstration. The Georgia Supreme Court's review of the prosecutor's argument was in the context of trial court error and an ineffective assistance claim. The Court found Petitioner Sonya Smith's failure to object during the closing argument gave the appellate court nothing to address on appeal regarding this allegation, and both

Petitioners failed to satisfy the error prong in order to prevail on the ineffectiveness allegation.

The alleged error in question came at the beginning of the prosecution's rebuttal to the defense closing. (Feb. 14, 2007, Transcript, pp. 69-70). At the prosecutor's prompting, the courtroom lights were dimmed, a birthday cake appeared, the candles were lit, and the prosecutor sang "Happy Birthday" to the victim. *Id.* At the conclusion of the song, the prosecutor argued about how the victim did not live to see his next birthday. *Id.* Neither of the Petitioners' trial attorneys objected to the argument in question. *Id.*

In her appellant's brief, Petitioner Sonya Smith argued that "the trial court was asleep at the wheel." (Brief of Appellant Sonya Smith, p. 14). Petitioner further asserted that "[w]ith or without objection, the trial judge should have stopped the sideshow." *Id.* However, Petitioner Sonya Smith did not make a specific argument with supporting law or facts highlighting that the trial court should have acted on its own to stop the prosecution's closing argument. *Id.* Petitioner Joseph Smith did not allege the same ground on appeal. Instead, he raised the issue within the context of an ineffective assistance claim for failing to object to the prosecutor's presentation.

Following oral argument, Petitioner Sonya Smith filed a supplemental brief in the Supreme Court of Georgia addressing how the birthday cake and song arose during the trial, citing case law regarding a similar issue before the Georgia appellate courts, and

addressing whether the state "plain error" rule should apply. (Supplemental Brief of Appellant Sonya Smith, pp. 2-11).

The Georgia Supreme Court did not address whether the trial court should have *sua sponte* acted to stop the birthday cake and song in closing argument. (Petition, App. 3, 4). Respondent asserts this deficiency was caused by neither Petitioner explicitly raising the error on appeal. The idea that the trial court should have acted on its own appeared in the dissent. (Petition, App. 22).

Thus, the record in this case shows that the prosecutor's argument was only raised and reviewed in the context of whether the trial court erred by allowing the prosecution to engage in the birthday cake lighting and song, and whether the appellate court could review it under a plain error analysis. No separate, substantive due process allegation was raised as error on direct appeal. Furthermore, the claim that the trial court should have *sua sponte* intervened to stop the prosecutor's actions was not clearly and plainly spelled out in the appellant's brief. Instead, it was injected into the trial court error allegation, and an argument stating the appellate court should review them under a "plain error" analysis was inserted through a supplemental brief.

This Court should decline to permit Petitioner to raise a substantive due process claim for the first time in this petition. *Cardinale v. Louisiana*, 394 U.S. 437 (1969). The fact that the issue was sparsely

mentioned in one of the appellate briefs and also in the dissenting opinion does not confer jurisdiction upon this Court. *See Beck v. Washington*, 369 U.S. 541, 553 (1962) ("Moreover, the failure of petitioner to argue the constitutional contention in his brief, as opposed to merely setting it forth as he did in one sentence of his 125-page brief, is considered by the Washington Supreme Court to be an abandonment or waiver of such contention.").

B. THIS COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER THE DUE PROCESS CLAIM BECAUSE, IF IT WERE TO GRANT CERTIORARI AND FIND FOR PETITIONERS, IT WOULD OVERRULE LONG-STANDING PRECEDENCE ON THE ISSUE.

Petitioner also requests this Court grant certiorari because the issue of prosecutorial misconduct is "regularly occurring in criminal trials across the country and thus the Court can address an issue of national importance." (Petition, p. 14). Without addressing the issue of whether this phenomenon is indeed widespread, Respondent submits that certiorari is not necessary because this Court has already provided guidelines for the prosecution and, if this Court were to grant certiorari and find for the Petitioners, it would be overruling precedent on the subject.

This Court does not hold that a single problem raised in closing argument is sufficient to find that a

defendant was denied due process in connection with his conviction. While closing argument is one aspect of a trial, if the remaining portions of the case show that the defendant's right to due process was sufficiently protected, then any claims about an improper remark being a due process violation must fail. *Donnelly v. DeChristoforo*, 416 U.S. 637, 645 (1974). "The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986), *citing Donnelly*.

An analysis of the Petitioners' criminal trial shows that no violation occurred which rendered the outcome of the proceedings unfair. The state's argument did not manipulate or misstate the evidence, and it did not implicate in a negative fashion any of the constitutional rights (such as the Fifth or Sixth Amendments) to which the Petitioners were entitled. *Darden* at 181-82. Thus, if this Court were to grant certiorari on this ground and rule for the Petitioners, it would have to overturn precedent this Court has already set on the issue.

Additionally, this Court historically has not delved into deciding whether each and every allegation of improper remarks by the prosecution in closing argument amounts to constitutional error. It did so in the matter of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), an Eighth Amendment case finding that a prosecutor's comment that a jury's decision to impose the death penalty was not final and reviewable by the

appellate court was improper. However, a major weighing factor in that case was the fact that the defendant was facing the death penalty. *See Caldwell*, 472 U.S. at 329. The Petitioners in the instant case did not face any such penalty.

Thus, certiorari should not be granted in this matter.

C. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO CONSIDER THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM BECAUSE IT IS FACT-INTENSIVE.

In question two, Petitioners ask the Court to grant certiorari to consider "whether defense counsel rendered ineffective assistance under the sixth amendment to the Constitution when counsel failed to object to the appeal to juror sympathy and trial counsel could only offer a talismanic and unreasonable justification of 'strategy/tactics' for the failure to object." (Petition, p. i). In the petition itself, Petitioners assert that granting certiorari on this issue "offers this Court the opportunity to clarify *Strickland*'s admonition that 'scrutiny of counsel's performance must be highly deferential.'" (Petition, p. 19). Petitioners further claim that "the Defendants should have been able to count on zealous representation to stop the misconduct, but counsel was missing in action hoping that the jury would recognize the

wrongfulness on its own accord rather than having it pointed out by defense counsel." (Petition, p. 20).

The Petitioners' application for certiorari should not be granted on this issue. It is evident that the Georgia Supreme Court utilized both the correct constitutional standard when evaluating this claim, and also performed an objectively reasonable analysis of the facts applied to that standard. In short, there is nothing further for this Court to review on the issue, and certiorari is not proper.

The Georgia Supreme Court found that the ineffective assistance of counsel claims pertaining to the birthday cake and song lacked merit for the following reason:

> Counsel made a strategic decision not to object to the "Happy Birthday" song during the State's closing argument. Specifically, he preferred to remain silent during the argument rather than run the risk of offending anyone on the jury by giving the impression that he was simply trying to disrupt the prosecutor's argument. See *Braithwaite v. State*, 275 Ga. 884, 886 (2) (b) (572 SE2d 612) (2002) (where attorney "reasonably cho[oses] silence [instead of objecting to improper closing argument], . . . we will not use hindsight to second-guess that decision on appeal"). As explained more fully in Division 10 (b), infra, while this Court frowns upon the prosecutor's antics and finds them to be highly inappropriate, counsel's decision to remain silent was reasonable, considering the fact that the

> prosecutor's argument was so "preposterous" and "over the top" that it may have worked to the benefit of the defense even absent an objection. Indeed, it cannot be said that the jury may not have been alienated by the prosecutor's theatrical stunt during its closing argument, as the jury found Sonya not guilty on several of the charges against her, including two charges of felony murder, one of the first degree cruelty to children charges, and the malice murder charge.

Smith, 288 Ga. at 354(8)(h).

> Arora testified at the motion for new trial hearing that he made a strategic decision not to object to the "Happy Birthday" song during closing argument. Specifically, Arora thought that the "Happy Birthday" song was so "preposterous," "absurd," and "over the top" that "it would turn the jurors off," and that he should not call any more attention to it by objecting to it. In this regard, we must remind all prosecutors in this State that it is not their job to pursue stunts and antics during their closing arguments that are designed merely to appeal to the prejudices of jurors, but
>
> > to see that justice is done and nothing more. That duty should not be forgotten in an excess of zeal or the eager quest for victory in [any given] case. The people of the state desire merely to ascertain beyond a reasonable doubt that the accused is guilty of the crime charged, and

> do not countenance any unfairness upon the part of their representatives in court.

(Citations and punctuation omitted.) *Carr v. State*, 267 Ga. 701, 712 (10) (482 SE2d 314) (1997). Indeed, in order to ensure that the prosecutor did not let her "excess[ive] . . . zeal or the eager quest for victory in [this] case" lead her to forget her duty "to see that justice is done and nothing more" (id.), the trial court would have been well within its right to control the courtroom by putting an end to the display of the prosecutor, even absent an objection from defense counsel. See OCGA § 15-1-3 (4) ("Every court has power . . . [t]o control, in the furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto").

In any event, because it was reasonable for Arora to pursue a strategy that would allow the potentially inappropriate antics of the prosecutor to backfire against her, we find no merit to Joseph's claim that Arora provided ineffective assistance in this regard. See *Braithwaite*, supra, 275 Ga. at 885 (2) (b). In this connection, it cannot be said that Arora was incorrect in his belief that the jurors may have been turned off by the closing argument, as the jury found Joseph not guilty on several of the charges against him, including two of the felony murder charges, one of

> the first degree cruelty to children charges, and the malice murder charge.

Smith, 288 Ga. at 355-56(10)(b).

A review of the opinion shows that the Georgia Supreme Court clearly utilized the correct constitutional standard as announced in this Court's opinion in *Strickland v. Washington*, 466 U.S. 668 (1984), to decide whether the trial attorneys were effective. *See Smith*, 288 Ga. at 352. A careful analysis was conducted to first determine if there was error on either trial counsel's part; however, no such error was found. Consequently, no analysis was conducted on the second *Strickland* prong, prejudice, as none was necessary.

Furthermore, the appellate court's factual determinations about this ineffective assistance claim are supported by the record. Petitioner Joseph Smith's attorney did not object to the song because, in his characterization, the song was "over the top" and ridiculous. (MNT. dated Feb. 20, 2009, p. 10). He did not object to it because he felt that would bring undue attention to the matter, and he also hoped that the song/stunt would backfire on the prosecution and turn jurors off from their case. (MNT. dated Feb. 20, 2009, p. 41).

To necessitate an examination of this specific ineffective assistance claim, this Court would have to engage in a fact-intensive review of the record regarding trial counsels' performances and second-guess what was clearly a strategic decision. Generally, this

Court will not reexamine the state court's factual conclusions. *Hernandez v. New York*, 500 U.S. 352, 366 (1991).

This Court has held that a review of an ineffective assistance claim must not only be fact-intensive for the specific allegation, but must also take into consideration all the facts and stages of the entire criminal proceeding to determine if the specific allegation has merit:

> *Strickland* requires a reviewing court to "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.*, at 690. It will generally be appropriate for a reviewing court to assess counsel's overall performance throughout the case in order to determine whether the "identified acts or omissions" overcome the presumption that counsel rendered reasonable professional assistance. Since "[there] are countless ways to provide effective assistance in any given case," *id.*, at 689, unless consideration is given to counsel's overall performance, before and at trial, it will be "all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Ibid.*

Kimmelman v. Morrison, 477 U.S. 365, 386 (1986).

Thus, this Court would have to engage in a substantial fact-finding inquiry and possibly "second-guess" the state court's findings on the ineffective assistance allegations. This is an action the Court typically does not take. *Hernandez*. Furthermore, any finding that Petitioners' trial attorneys were ineffective based solely on the issue of the birthday cake and song alone would run counter to this Court's standard in *Strickland* finding that counsel's performance must be viewed in totality of the entire case.

For these reasons, this Court should decline to grant certiorari on this issue.

CONCLUSION

Wherefore, for all the above reasons, Respondent prays that this Court decline to grant certiorari.

Respectfully submitted,

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